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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 81

LEE E. A. PARKER,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Petitioner prays that this Court reverse the judgment of the Supreme Court of Oregon in the above-entitled case.

Citations to Opinions Below

The opinion of the post-conviction hearing court (Circuit Court of Multnomah County), unreported, is printed in the Record at page 194. The opinion of the Supreme Court of Oregon, —— Ore. ——, 407 P.2d 246 (1965), is printed in the Record at page 203.

Jurisdiction

The judgment of the Supreme Court of Oregon was entered on November 3, 1965. A timely petition for rehearing was denied on December 7, 1965. The certiorari

jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3), and a writ of certiorari was granted by this Court on April 18, 1966.

Constitutional Provisions Involved

Amendment 6 of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment 14, Section 1, of the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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Question Presented

Where the bailiff in charge of the jury during defendant's murder trial told jurors "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," did defendant's conviction and sentence to life imprisonment violate due process?

Statement

Petitioner seeks reversal of a decision of the Supreme Court of Oregon which denied post-conviction relief under a statute directing such relief when there has been a "substantial denial . . . of petitioner's rights under the Constitution of the United States."* The decision of the Supreme Court of Oregon reversed a decision of the Circuit Court of Multnomah County, which had granted a new trial because of its finding of fact (accepted by the Supreme Court of Oregon) that the bailiff in charge of the jury told members of the jury: "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it." Record 197.

Petitioner Lee Parker was convicted of second-degree murder on May 18, 1961, and sentenced to life imprison-

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* O.R.S. § 138.530(1)(a):

"(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

"(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

ment. *Affirmed*, 235 Ore. 366, 384 P.2d 986 (1963).* Petitioner then filed a petition for post-conviction hearing and relief, alleging, among other things, that he had been denied a fair trial in accordance with due process of law by the misconduct of the bailiff in "discussing the case directly with the jurors," and "passing on the guilt of the petitioner to the jurors during trial." Record 3.

At a hearing before the Circuit Court of Multnomah County, three women—two regular jurors and an alternate juror—testified that they had heard the bailiff make the statements quoted above. Record 17-20, 30, 42-45, 51-54, 60-61, 63-64, 180, 187-90 (Mrs. Inwards); Record 65-66, 76 (Mrs. Drake); Record 79-80, 83-85 (Mrs. Gattman). The two regular jurors also testified that one of the bailiff's statements quoted above was made in the presence of an additional, unidentified juror (probably a man). Record 18, 30, 52-53, 63-64, 65-66, 76. Nine regular jurors and the other alternate juror testified they had not heard the bailiff make the statements quoted. Record 90-136, 150-54.** The bailiff testified he could not remember making the statements quoted. Record 157-61, 167-68, 171-72.

Based on this record, the hearing court found as a fact that the bailiff had made the statements quoted above. Record 197. Noting that the trial had lasted eight days, during which there was opportunity for close association between the jurors and the bailiffs assigned to the trial,†

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* This was petitioner's second trial. His first conviction, in 1958, had been reversed by the Supreme Court of Oregon on grounds unrelated to the present petition. 225 Ore. 88, 356 P.2d 88 (1960).

** The twelfth regular juror did not testify at the post-conviction hearing because the State had not been able to serve her with a subpoena. (Original Transcript 88-89 [not printed].)

† The jury was sequestered during the entire trial. Record 136-39.

and that the jury had deliberated twenty-six hours, Record 197-98, the court held "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." Record 199. The court accordingly ordered a new trial for the defendant.

The State appealed to the Supreme Court of Oregon, which accepted the facts as found by the post-conviction trial court, and held that the issue of the bailiff's misconduct was timely raised because it could not reasonably have been raised on appeal. The Supreme Court held, however, that these facts did not result in denying petitioner a "constitutionally fair trial."

The federal question involved in this case arises by the terms of the statute under which petitioner proceeded, O.R.S. § 138.530, which directs relief where federal constitutional rights have been denied. The decision of the Supreme Court of Oregon necessarily passed on this federal question, as indicated by that court's statement of the question to be decided:

> "The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon." [—— Ore. ——, 407 P.2d at 248 (1965).]

Summary of Argument

The facts of this case are not in dispute. They show the most elementary denial of rights guaranteed by the Fourteenth Amendment. A person has been convicted of murder by the State of Oregon and sentenced to life im-

prisonment after a trial in which he was denied two essential elements of a fair trial: the right to confront his accusers, and the right to trial by a jury free from out-of-court influence. The holding of the Supreme Court of Oregon that such a trial and conviction are consistent with the basic guarantees of the Fourteenth Amendment is in square conflict with decisions of this Court.

ARGUMENT

I. The Trial Accorded Petitioner by the State of Oregon Violated His Federal Constitutional Rights in Two Fundamental Particulars.

It is established that during the course of petitioner's trial for murder, an officer of the State of Oregon, having custody of the jury and being in intimate contact with it throughout the trial, expressed to several of the jurors his conviction that petitioner was guilty as charged and further that the jurors need not fulfill their office to the best of their ability and conscience because the courts would give petitioner relief from any wrongful conviction. All this was, of course, outside of the courtroom and unknown to petitioner and to the trial judge. That it occurred is not now disputed by the State.

The decision of the court below endorsing a conviction secured in these circumstances denies petitioner's right to confront his accusers and his right to be tried by a jury uninfluenced by prejudicial out-of-court events—two fundamental rights inherent in our concept of a fair trial.

Only last year this Court reversed a state conviction where both these rights were similarly violated, though not so clearly as here. In *Turner* v. *Louisiana*, 379 U.S.

466, two deputy sheriffs who were prosecution witnesses also served as jury bailiffs. The decision of this Court was based on the ground that a prejudicial atmosphere was created by the two deputies being in constant contact with the jurors throughout the trial, and that—despite the State's denials—there *may have been* things said to the jurors out of court which related to the merits of the case. In holding that the mere "potentialities of what went on outside the courtroom" rendered the conviction void, this Court said:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." [379 U.S. at 472-73.]

Whereas in *Turner* there was no proof that there was any "evidence developed" against the accused off the witness stand, in the present case just such an occurrence is established by uncontested findings of fact. Moreover, the influence of Oregon's bailiff in the present case was probably greater than what occurred in *Turner* because the bailiff was not identified as a prosecution witness—as the deputies in *Turner* had been—and there was no attack on his credibility—as there had been in *Turner*. The jurors could well have believed that Oregon's bailiff—an unimpeached, and indeed unchallenged, state official—had access to information denied them by "technical" rules of evidence.* Compare *Marshall* v. *United States*, 360 U.S. 310, 312-13.

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* Information derived from petitioner's first trial, for example.

This Court has recently held that the Sixth Amendment right of an accused to confront and cross-examine the witnesses against him is a fundamental right secured by the Fourteenth Amendment against impairment by the States. *Pointer* v. *Texas*, 380 U.S. 400. In *Pointer* a witness who had testified at a preliminary hearing at which defendant had not been represented by counsel died before trial. At the trial the transcript of this pre-trial testimony was admitted into evidence and this Court held the use of evidence untested by cross-examination denied "one of the fundamental guarantees of life and liberty," quoting *Kirby* v. *United States*, 174 U.S. 47, 55. Obviously this fundamental feature of a fair trial is violated when Oregon permits one of its state officers in effect to testify secretly to the jurors that in his judgment petitioner is guilty. This kind of inflammatory opinion statement would not have been admissible if offered from the witness stand. Clearly the Fourteenth Amendment prohibits the states from securing a conviction where such a statement is made outside of the courtroom and without the essential protection of cross-examination.

This Court has also had frequent occasion in recent years to reaffirm the other fundamental feature of a fair trial which the decision below violates: the right to a jury isolated as far as possible from potentially prejudicial out-of-court influence. The basic principle involved was expressed by Justice Holmes in *Patterson* v. *Colorado*, 205 U.S. 454, 462:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Only last term this Court identified the principle discussed by Justice Holmes as an "undeviating rule." *Sheppard* v. *Maxwell*, 384 U.S. 333, 351.

The constitutionality of trial before a jury exposed to extrajudicial influence was extensively discussed in *Irvin* v. *Dowd*, 366 U.S. 717:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States*, 98 U.S. 145, 155." [366 U.S. at 722.]

More recently, this Court has reversed convictions in *Rideau* v. *Louisiana*, 373 U.S. 723, and *Sheppard* v. *Maxwell*, 384 U.S. 333, because of widespread publicity creat-

ing an "environing atmosphere" of guilt.* See also *Estes* v. *Texas*, 381 U.S. 532. Cases dealing with the general out-of-court influence on juries do not present the direct and immediate jury impact that is presented in this case where an officer of the state communicated directly to the jurors his opinion of guilt.

Whether the misconduct here is viewed as a problem of jury consideration of material untested by confrontation and cross-examination, or a problem of out-of-court influence upon juries, it is clear, as in *Turner*, that "what happened in this case operated to subvert [the] basic guarantees of trial by jury." 379 U.S. at 473.

II. The Constitutional Infringement Shown Here Cannot Be Justified on Any Adequate Grounds.

In many instances individual rights under the Constitution are defined by reference to other legitimate interests of society at large. But here the State can suggest no adequate reason why its officers should be allowed secretly to inform juries that criminal defendants are, in their opinion, guilty.

The Supreme Court of Oregon did not attempt to justify the treatment accorded petitioner by reliance on any countervailing considerations, tacitly admitting that there are none. It accepted the facts (including the post-conviction court's finding of prejudice); it acknowledged its own rule requiring it to question and set aside a jury verdict wherever the plainest principles of justice demand it;**

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* *Frank* v. *Mangum*, 237 U.S. 309, 349 (dissenting opinion of Holmes, *J.*).

** The Supreme Court of Oregon cited its recent case of *State* v. *Gardner*, 230 Ore. 569, 371 P.2d 558 (1962), where an ex-

it explicitly acknowledged petitioner's federal constitutional claim; and it recognized the similarity between this case and *Turner* v. *Louisiana*. Nonetheless, the Supreme Court of Oregon held that the prejudicial error found in this case "does not deprive the defendant of a constitutionally fair trial." Record 210. This question, however, is always one for final determination by this Court, and there can be no doubt in this case that reversal is required.

The prosecution has suggested in its brief in opposition to the petition for a writ of certiorari that the decision below can be supported on the ground that no prejudice was shown, but this contention runs afoul of both facts and law. As to the facts, the post-conviction hearing court found "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." In finding prejudice, the hearing court considered the fact that the issues were complex enough to require an eight-day trial, and specifically referred to the fact that the jury had required twenty-six hours to reach a verdict. This finding of prejudice was not upset by the Supreme Court of Oregon. In any event, the law is perfectly clear—at least after *Estes*, *Sheppard*, and *Turner*—that proof of actual prejudice is not a precondition to the assertion of the right to a fair trial when, as here, the

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haustive review of the cases showed the Oregon rule to be that "a verdict is impeachable if justice demands that it be set aside." 230 Ore. at 573-74, 371 P.2d at 560. Compare *State* v. *Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955), summarizing cases from many jurisdictions to show a general accord in favor of this rule.

Even if there were a rule, which Oregon does not have, prohibiting receipt of evidence to impeach a verdict, this rule would have no application to a case of misconduct committed by someone other than a juror. Nor, of course, could such a general rule of evidence insulate a conviction from an attack based on federal constitutional claims.

"procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas*, 381 U.S. at 542-543. Even more obviously than in *Turner*, "it would be blinking reality not to recognize the extreme prejudice inherent" in permitting the type of testimonial statements by a state officer that Oregon has sanctioned in this case. *Turner* v. *Louisiana*, 379 U.S. at 473. *Accord, Rideau* v. *Louisiana, supra; Irvin* v. *Dowd, supra; Marshall* v. *United States, supra.*

Oregon's prosecutors' claim of no prejudice seems to be based on a theory that no harm was done because ten members of the jury testified they had not heard the bailiff's statements, and Article 1, Section 11 of the Oregon Constitution allows ten members of the jury to render a guilty verdict. Respondent's view plainly has nothing to do with the way the twelve people of a jury interact in order to reach a verdict.*

The State's makeweight argument was sufficiently answered by the Supreme Court of Louisiana when it reversed a conviction in circumstances identical to those shown here:

> "It is argued that no harm was done by the deputies in this case, because nine of the jurors testified that the deputies did not attempt to influence their judgment, and because at least ten, and more likely eleven, of the jurors voted to convict the defendant, when the concurrence of only nine was enough to convict. There is some logic in the argument, but it overlooks the

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* This argument also ignores the testimony that a third, unidentified regular juror heard one of the prejudicial statements. Record 18, 30, 52-53, 63-64, 65-66, 76. See also Record 204.

fact that, notwithstanding the defendant could be legally convicted by the unfavorable vote of nine as well as of twelve jurors, he was entitled to be tried by twelve—not nine or ten or eleven, but twelve—impartial and unprejudiced jurors." [*State* v. *Murray*, 164 La. 883, 887, 114 So. 721, 723 (1927).]*

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed, and the case remanded to that court for proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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* See *Pichler* v. *Kansas City Public Service Co.*, 357 Mo. 866, 211 S.W. 2d 459 (1948); *Texaco, Inc.* v. *Federal Trade Comm.*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964); *Piggott* v. *Borough of Hopewell*, 22 N.J. Super. 106, 91 A.2d 667 (1952); *Daly* v. *Town Plan & Zoning Comm.*, 150 Conn. 495, 191 A.2d 250 (1963).